

ADDENDUM

NOTICE: THIS IS AN UNPUBLISHED
OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United-States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Kevin W. BOOTH, Defendant-Appellant.

No. 90-5748.

July 3, 1991.

On Appeal from the United States District Court for the Western District of Tennessee, No. 89-20219; Horton, J.

W.D.Tenn.

AFFIRMED.

Before KENNEDY and ALAN E. NORRIS,
Circuit Judges, and JOINER, Senior District Judge.
[FN*]

PER CURIAM:

**1 Defendant was indicted for and convicted of committing the offense of aggravated sexual abuse on a federal installation in violation of 18 U.S.C. § 2241. He appeals his conviction challenging the sufficiency of the evidence, the jury instructions pertaining to the elements of the offense, an alleged constructive amendment of the indictment and the admission of possible hearsay testimony. For the following reasons, we AFFIRM.

Defendant was arrested and criminal proceedings commenced based on a violation of 18 U.S.C. § 2241, which states:

Whoever ... knowingly causes another person to engage in a sexual act--

(1) by using force against that other person, or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

A grand jury indictment charged that defendant did "unlawfully, feloniously and forcibly, while armed with a weapon, that is, a knife, sexually penetrate Regina Strickland, thereby committing the offense of Aggravated Sexual Abuse...." Joint App. at 10. At trial, the government introduced evidence to show that defendant either used force or threatened to use force against the victim in order to accomplish his illegal end. The District Court instructed the jury that defendant could be convicted only if "defendant ... knowingly used force, threatened or placed Mrs. Regina Strickland in fear that she would be subject to death or serious bodily injury...." Joint App. at 185. Defense counsel raised no objection to these instructions.

Defendant urges before this Court that the evidence presented and the jury instruction given amount to a constructive amendment of the indictment. He argues that while the indictment charged that defendant committed the alleged offense forcibly, the evidence showed and the jury instruction permitted the defendant to be found guilty of the alleged offense if he either used force or threatened to use force. According to defendant, since the evidence and instruction permitted conviction if the jury found defendant used threats of force, the indictment was constructively amended requiring reversal of his conviction.

The dangers to a defendant when an indictment is broadened are primarily twofold. First, a defendant is denied clear notice of the allegations against which he must defend. This prevents meaningful preparation by a defendant for his trial and results in unfair surprise at the proceedings. Second, the amended indictment cannot be used in the future as a bar to subsequent prosecutions. *United States v. Miller*, 471 U.S. 130 (1985); *Berger v. United States*, 295 U.S. 78 (1935). Not all changes to an indictment implicate these